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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

THE CITIZENS BANK
Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

Has the Alabama Supreme Court departed from *Allied-Bruce* and its progeny, as well as from other state and federal courts, in holding that an individual transaction, standing alone, must not only "involve" commerce but must also "substantially affect" interstate commerce to come within the purview of the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT

The Citizens Bank has no parent company. There are no publicly held companies owning at least ten percent of the stock.

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COMES NOW the Petitioner, and requests that this Court issue a writ of certiorari to the Supreme Court of Alabama in the above-referenced matter.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has not been released for publication in a reporter. The text of the opinion is reprinted and attached to this petition as Petitioner's Appendix (Pet. App.) at pp. A1-A25. It is also available through Westlaw at 2002 WL 1998268. The denial of an application for rehearing in that court is also attached. (Pet. App. A26). The order of the trial court compelling

arbitration in the case is not a reported decision, and is also reprinted and attached to this petition. (Pet. App. A27).

JURISDICTION

The Alabama Supreme Court entered a judgment denying the petitioner's right to arbitration on August 30, 2002, and overruled a timely application for rehearing on November 27, 2002. The jurisdiction of this court is invoked pursuant to 29 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

This case involves construction of the Federal Arbitration Act. Section 2 of the Act (9 U.S.C. § 2) provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section one of the Act (9 U.S.C. § 1) provides in pertinent part:

> **"Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT OF THE CASE

This case involves the Alabama Supreme Court's construction of Section 2 of the Federal Arbitration Act (FAA) and its test for "interstate commerce." Once again, the Alabama Supreme Court has embraced a reading of the FAA that is in direct opposition to its purpose, and that instead furthers Alabama's hostility toward arbitration.[1] Contrary to this Court's instruction that the "involving commerce" prerequisite of Section 2 means "affecting commerce," the Alabama Supreme Court has stated its rule in numerous cases that a transaction must "substantially affect" interstate commerce to come under the FAA. In the case below, the court reversed a trial court order compelling arbitration, reasoning that the commercial loan contract at issue did not

[1] Pursuant to Alabama Code Section 8-1-41(3), the state has banned pre-dispute arbitration agreements in their entirety.

evidence a transaction that "substantially affects" interstate commerce.

The arbitration agreements at issue arose out of a series of commercial loan transactions between the lender, The Citizens Bank, ("Citizens Bank") and debtors Alafabco, Inc., and Donnie Cottingham, Joann Beck, and Weston Beck (officers and employees of Alafabco who executed personal notes) (hereinafter collectively "Alafabco"). Alafabco is an Alabama fabrication company. Alafabco borrowed large sums of money on numerous occasions from Citizens Bank for the purpose of covering business operating expenses on construction contracts. Alafabco used these funds to finance labor and material costs for work performed on its contracts, including work in Alabama, North Carolina and Tennessee. (Vol. I, CR. 117).[2]

Alafabco defaulted on its various loan obligations to Citizens Bank and the bank began collection efforts. Attorneys for the parties negotiated an agreement under which *all* of Alafabco's debts to the bank were restructured and redocumented in several notes dated May 3, 1999. In this restructuring, Alafabco provided a security interest in all of its business assets, including accounts receivable, inventory, equipment and motor vehicles. Three of Alafabco's officers provided personal notes secured by mortgages. (Vol. Ex., G, H). Each debtor also executed an arbitration agreement:

> AGREEMENT TO ARBITRATE. The Citizens Bank ("Lender") and the undersigned agree that all disputes, claims, or controversies

[2] References to the appellate record are by the volume, followed by the designated page of the clerk's record ("CR") or transcript ("TR"). The clerk assembled one volume of exhibits, referenced herein as "Vol. Ex."

> ("Disputes") between them, whether individual, joint, or class in nature, including contract and tort disputes and any other matter at law or equity, shall be resolved by arbitration upon request of either party at any time, notwithstanding the prior filing by either party of any legal action, except as otherwise indicated in this Agreement or agreed to in writing by the parties. In an arbitration, an arbitrator, who is an independent, neutral party, gives a decision after hearing the positions of the parties. It is understood and agreed that arbitration pursuant to this agreement shall be binding upon both parties and that both parties are waiving their respective rights to a jury trial. However, nothing in the loan documents or this agreement shall preclude any party from seeking equitable relief from a court of competent jurisdiction.
>
> . . .
>
> GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern.

(Vol. Ex. I, P).

After this restructuring of the debt, Alafabco again defaulted on the notes. In response to collection efforts, Alafabco filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Alabama.

Citizens Bank filed a motion in the Bankruptcy Court for adequate protection regarding Alafabco's continued use of the loan collateral. The Bankruptcy Court entered an Order under which Alafabco stipulated to a perfected security interest and lien upon its assets. (Vol. Ex., A). The parties once again restructured the loan obligations, executed new loan documents dated December 10, 1999, and the bankruptcy proceedings were dismissed. (Vol. Ex., B, C, D). This second debt restructuring involved a total amount of approximately $430,000 secured by commercial real estate owned by the individual officers, as well as the business assets of Alafabco. All debtors again signed arbitration agreements virtually identical to the ones excerpted above. (Vol. Ex., E, F).

Approximately one year after execution of the last renewal notes, Alafabco sued Citizens Bank and three of its officers under various theories including breach of fiduciary duty, breach of implied contract, misrepresentation, negligence, and intentional infliction of emotional distress. (Vol. I, CR. 7). Citizens Bank moved the trial court to compel arbitration pursuant to the arbitration agreements executed by each debtor. (Vol. I, CR.68). In support of this motion Citizens Bank submitted affidavits from bank officers Roger Campbell and Doug Alexander establishing that a substantial portion of the money loaned to Alafabco by Citizens Bank was used by Alafabco to finance labor and materials on contracts for work in North Carolina, Tennessee, and Alabama. (Vol. I, CR. 76, 117). The use of these funds both in state and out of state is documented by invoices contained in the record.[3] (Vol. I, CR. 86, 92 (North Carolina), 84 (Tennessee), 87 (Alabama)).

[3] Citizens Bank made loans to Alafabco, taking a security interest in outstanding invoices to Alafabco customers. For example, one bank loan of $31,659.49 references as security "Champion Int. Inv. No. 676; Job 1430," indicating that the funds were loaned for and used for work on a

As reflected in the renewal notes executed in May and December of 1999, Citizens Bank held a security interest in the inventory of Alafabco, including inventory manufactured and created using sub-products obtained outside the state of Alabama, utilizing raw materials manufactured outside the state of Alabama and sold through utilization of the United States mails and telephones in interstate commerce. (Vol. I, CR. 78). Citizens Bank held a security interest in all of Alafabco's tools, machines and equipment, manufactured throughout the United States. (Vol. II., Tr. 14-15). Citizens Bank also held a security interest in the intangible business property of Alafabco, including accounts receivable and unpaid invoices from out-of-state companies. (Vol. II., Tr. 14). The security interest held by Citizens Bank in accounts receivable of Alafabco includes receivables distributed through the mail and deposited in bank accounts subject to Federal Regulations. (Vol. I, CR. 78).

Further, the December debt restructuring was accomplished in the course of United States Bankruptcy proceedings, applying federal law and procedures. Payments by and between the parties in connection with the transactions underlying the agreements were accomplished by checks which were cleared by the Federal Reserve, using the United States mails and interstate financial settlement procedures and institutions. Policies and procedures governing Citizens Bank and its transacting of business with Alafabco are subject to regulation by federal agencies and federal laws.

North Carolina project. (Vol. I, CR. 90, 92). See also Vol. I, CR. 86, 88 reflecting $21, 130.01 loaned and security listed as Champion Int. Inv. No. 681, Job 1436 (North Carolina job).

The evidence submitted by Citizens Bank also established that the bank's commercial loan business in the aggregate is quite substantial, including large commercial loans in the millions of dollars. (Vol. II, Tr. 8). Citizens Bank issues loans in other states including Florida and Colorado, and has deposit customers located throughout the southeastern United States, and other customers throughout the country as a whole. (Vol. II, Tr. 13).

The trial court found that the loan transactions at issue involved interstate commerce, and entered an order staying the proceedings and compelling arbitration of Alafabco's claims against Citizens Bank.[4] (Vol. I, CR. 194-95). Alafabco appealed this ruling to the Alabama Supreme Court. That court reversed, holding that Citizens Bank failed to prove a sufficient nexus with interstate commerce to invoke the FAA. The court stated that the proponent of arbitration "bears the burden of proving a sufficient connection with interstate commerce . . .applying the five-part test set forth in [*Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759 (Ala. 2000)]." (Pet. App. A7). In *Sisters of the Visitation*, the Alabama Supreme Court instructed that one seeking to compel arbitration must prove a "substantial" affect on interstate commerce under a test examining the following: (1) the citizenship of the parties, (2) the origin of tools and equipment actually used in the transaction, (3) the allocation of cost of services and materials, (4) the subsequent movement across state lines of the object of the services, and (5) the degree of separability from other contracts. *Sisters of the Visitation*, 775 So.2d at 765-57. The Alabama court applies this test to the particular transaction at issue to see if *that transaction* substantially affects interstate commerce; the court does not consider the aggregate effect of

[4] Arbitration as to defendant Charles Coffey was denied, as he was not a signatory to any of the arbitration agreements. (Vol. I, CR. 193).

similar activity upon interstate commerce. Applying this analysis, the Alabama court has denied arbitration in numerous contexts.[5]

Applying the principles of *Sisters of the Visitation* to the instant case, the Alabama Supreme Court determined that Citizens Bank failed to prove that the 1999 loan restructurings, standing alone, substantially affected interstate commerce. The court rejected arguments relating to the interstate use by Alafabco of the loan proceeds, determining that Citizens Bank was required to prove which portions of which loan proceeds were actually used in other states, and what portion of those proceeds were still unpaid and thus included in the loan restructurings of May and December of

[5] In the opinion below, Alabama Supreme Court Justice See noted:

> Since our decision in *Sisters of the Visitation* in March 2000, this Court has routinely denied a party the right to arbitration where that party has failed to prove that the individual transaction substantially affected interstate commerce. *See Aronov Realty Brokerage, Inc. v. Morris*, [2002 WL 734345] (denying arbitration in an action brought by the purchaser of a condominium unit against a real estate brokerage, a real estate agent, and the condominium association); *Liberty Nat'l Life Ins. Co. v. Douglas*, [826 So.2d 806 (Ala. 2002)] (refusing to compel arbitration where an employee of an insurance company sued her employer); *Ex parte Kampis*, [826 So.2d 819 (Ala. 2002)] (denying arbitration in an action brought by the purchaser of a house against a contractor); *Alternative Fin. Solutions, LLC v. Colburn*, 821 So.2d 981 (Ala.2001) (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); and *Ex parte Learakos*, [826 So.2d 782 (Ala. 2001)(denying arbitration in an action brought by the purchaser of a house against a real estate company and its agents). (Pet. App. 22-23).

1999.[6] (Pet. App. 13-15). The court likewise refused to consider the aggregate effect of similar transactions upon interstate commerce.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama has decided an important issue concerning the phrase "involving commerce" in Section 2 of the FAA in a manner that runs contrary to language of Section 2 and the established purpose of the Act. Consistent with the purpose of the Act, [7] the phrase "involving commerce" is construed broadly. Section 2 by its terms applies to any contract evidencing a transaction "involving" commerce. This Court has stated that the phrase "involving" commerce is the functional equivalent of "affecting" commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995) (the reach of the Act coincides with that of the Commerce Clause itself), citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (noting Congressional intent to enforce arbitration agreements "within the full reach of the Commerce Clause") and *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984) ("involving commerce" marks the outer reach of the Act).

The Alabama Supreme Court, (although previously reversed by this Court in *Allied-Bruce* for implementing a too narrow construction of the "commerce" requirement), again

[6] The record establishes that *all* previous loans were included in the debt restructurings. (CR 117). Thus the loans used for work in other states were included in the restructurings.

[7] This Court has stated that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995), citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

limits the scope of the Federal Arbitration Act by a restrictive reading of Section 2. The court rejects a construction of Section 2 which would encompass transactions that "involve" or "affect" interstate commerce, instead embracing the view that an individual transaction, standing alone, must "substantially affect" interstate commerce to be within the reach of the FAA. This construction of Section 2 is contrary to the letter and spirit of the Act. The court's insistence upon examining the minutia of an individual transaction for substantial relation to interstate commerce is incorrect and at odds with established FAA jurisprudence. Further, the Alabama court's test for interstate commerce is inconsistent with other state and federal courts.

I. THE DECISION BELOW APPLIES A TEST THAT IS CONTRARY TO THIS COURT'S PRECEDENTS AND THAT CONTRAVENES THE LANGUAGE AND PURPOSE OF SECTION 2.

Alabama's development of a test for substantial interstate nexus in *Sisters of the Visitation* is diametrically opposed this Court's precedent and to the purposes of the FAA. The Alabama Supreme Court initially embraced a "slightest nexus" test for interstate commerce. *Ex parte Costa & Head*, 486 So.2d 1272, 1275 (Ala. 1986) ("The requirement of the FAA that an arbitration agreement 'involve commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA."). The court later rejected that analysis, as manifested in its 1993 ruling that the FAA was inapplicable where the parties did not "contemplate" substantial interstate activity at the time

they entered the contract.[8] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So.2d 354, 356 (Ala. 1993). On certiorari, this Court, noting that the FAA embodies "a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), reversed the Alabama Supreme Court. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). The Court rejected "contemplation of the parties" and instead adopted a "commerce in fact" analysis. *Allied-Bruce*, 513 U.S. at 281 ("[W]e accept the 'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection"). This Court also expounded upon the very broad reach of the words "involving commerce" found in Section 2. *Allied-Bruce*, 513 U.S. at 273-74 ("involving commerce" covers more than only activities within the flow of commerce; concluding that "involving" is the functional equivalent of "affecting").

Three months after deciding *Allied-Bruce*, this Court decided *United States v. Lopez*, 514 U.S. 549 (1995), involving the constitutionality of The Gun-Free School Zones Act (which made it a federal crime "for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."). This Court determined that the law was beyond Congress' authority under the Commerce Clause, primarily because the statute did not regulate commercial activity and did not require any connection to interstate commerce. *Lopez*, 514 U.S. at 551. The Alabama Supreme Court has seized upon language in *Lopez* to limit application

[8] The court adopted this "contemplation of the parties" test because it promoted the court's "strong public policy" against predispute arbitration agreements. *Lopez v. Home Buyers Warranty Corp.*, 628 So.2d 361, 363 n.2 (Ala. 1993).

of the FAA to individual economic transactions that have no "substantial" effect on interstate commerce.

A. The Alabama Supreme Court improperly reads *Lopez* as requiring that a commercial transaction must not only "involve" or "affect" interstate commerce under Section 2 of the FAA, (as set forth in *Allied-Bruce*), but must "substantially affect" interstate commerce.

Following *Allied Bruce* and *Lopez*, and relying on both cases, the Alabama Supreme Court decided *Sisters of the Visitation*. The court recognized the holding of *Allied-Bruce* that, to involve interstate commerce, a transaction must "in fact" involve interstate commerce. The court also noted language in *Lopez* stating that for Congress to regulate an activity under the Commerce Clause, the effect of that activity upon interstate commerce must be "substantial." The Alabama court then determined that, although the *Lopez* "substantial effect" language was dictum, the court would nevertheless follow that language in analyzing the scope of the FAA:

> The [United States Supreme Court]...stated that for an economic activity to come within Congress's authority under the Commerce Clause the activity must "substantially affect" interstate commerce. The *Lopez* Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity. That broad reference, albeit dictum, does not suggest that the requirement of a substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation, 775 So.2d at 761. (internal citations and footnotes omitted). The Alabama Supreme Court adopted the *Lopez* "substantial affect" language as applicable to all interstate commerce inquiries under the FAA.[9] Currently in Alabama, to come within the purview of the FAA, an individual transaction must not only "in fact" involve commerce, but must also "substantially affect" interstate commerce under the five-part test enunciated in *Sisters of the Visitation*.

The reasoning of the court and its holding are at odds with this Court's precedent. *Lopez* involved no economic activity. This Court determined the criminal statute was beyond Congress's power to enact because the statute "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. *Lopez* concerned purely intrastate acts, and the issue was not what quantum of evidence would satisfy an interstate commerce jurisdictional prerequisite. Rather, the issue was whether Congress had the authority to pass the law.

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[9] This decision inexplicably departed from prior Alabama Supreme Court decisions taking the exact opposite view. In *Hurst v. Tony Moore Imports*, 699 So.2d 1249, 1257 (Ala. 1997), the court stated:

> However, we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of "interstate commerce" in cases clearly involving commercial transactions. The Court's opinions discussing the reach of the Commerce Clause seem to hold that almost any commercial transaction undertaken may "affect" interstate commerce, no matter how slightly, and therefore can be regulated by Congress. These cases stand for the proposition that if *any* effect on interstate commerce can be found in a commercial transaction, then the transaction is considered to be one involving interstate commerce." (internal citations and footnotes omitted).

Additionally, the *Lopez* case was decided only three months after *Allied-Bruce*. This Court did not mention *Allied-Bruce* when it stated in *Lopez* that an activity must "substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Lopez*, 514 U.S. at 559. The Supreme Court of Alabama continues to issue opinions stating that a transaction must have a "substantial" effect upon interstate commerce to invoke the FAA. See, e.g., *Parkway Dodge, Inc. v. Hawkins*, 2003 WL 257409 *3 (Ala.) (to satisfy the interstate commerce criterion, "the involvement of, or effect on, interstate commerce must be substantial"), quoting *Chesser v. AmSouth Bank, N.A.*, 2002 WL 31151340 *3 (Ala.); *Rogers Found. Repair, Inc. v. Powell*, 748 So.2d 869, 871 (Ala.1999)). This position taken by the Alabama Supreme Court means that *Lopez* had to modify *Allied-Bruce*, something this Court has not indicated it intended to do. In fact, after *Lopez* this Court reaffirmed the breadth of the interstate commerce nexus set forth by *Allied-Bruce* and its predecessors. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (reaffirming the broad reach of the words "involving commerce" and citing *Allied-Bruce* for the proposition that Section 2 implements Congress' intent to exercise its power "to the full."). Thus, to give effect to the Alabama Supreme Court's decision would require one to ignore *Allied Bruce* in favor of dicta in *Lopez*.

B. The decision below improperly focuses upon individual commercial transactions, rather than their effects in the aggregate.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court held that Congress could, consistent with the Commerce Clause, regulate wheat produced by a farmer for personal consumption on his own farm. Even though the

farmer's impact upon the overall demand for wheat "may be trivial," where "his contribution, taken together with that of many others similarly situated" is not trivial, Congress could regulate the activity consistent with the Commerce Clause. *Wickard*, 317 U.S. at 127-28. This Court thus upheld the aggregation approach to testing the effect of a commercial activity upon interstate commerce, as opposed to testing the isolated activity in a vacuum. See also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) ("As we explained in *Fry v. United States*, 421 U.S. 542 [(1975)], '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, *combined with like conduct by others similarly situated*, affects commerce among the States or with foreign nations.'") (emphasis added). The *Wickard* Court also rejected any distinction between conduct that directly affects interstate commerce and that which only indirectly affects interstate commerce, holding that purely local activity may be reached by Congress regardless of whether its effect on interstate commerce is considered direct or indirect.[10] *Wickard*, 317 U.S. at 125.

Alabama, however, now follows quite the opposite approach. Rather than considering the aggregate effects of large commercial loan transactions such as this one upon interstate commerce, (involving, as here, construction loan proceeds crossing state lines), the Alabama court insists that the focus must be upon each individual transaction and its reach. As Alabama Supreme Court Justice See noted, following *Wickard* and its "aggregation" approach, this Court did not overturn a congressional act on the grounds that it

[10] Earlier, the Court had stated that where the effect of intra-state transactions upon interstate commerce was merely indirect, Congress could not regulate those transactions. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935). The *Wickard* Court eliminated a distinction between direct and indirect effect.

exceeded Commerce Clause authority for some fifty years. See *McConnell Auto Corp. v. Jackson*, 2002 WL 31439766 *9 (Ala.) (dissenting opinion). Justice See's words in *McConnell* (echoed in the Citizens Bank opinion below) summarize how the Alabama Supreme Court has departed from established Commerce Clause and FAA jurisprudence:

> The Supreme Court of the United States stated in *Lopez* that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity—not the individual transaction in isolation—must "substantially affect" interstate commerce. [*Lopez*, 514 U.S. at 556-57]. This "substantial-effect" test—used to determine the constitutionality of a statute under the Commerce Clause—was not a new standard created in *Lopez* but has been the test of a statute's constitutionality since the early twentieth century. *Id.* at *555-57.* Once it has been determined that Congress acted within its Commerce Clause power in enacting a statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As *Wickard* made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where *a general regulatory statute bears a substantial relation to commerce,* the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Lopez*, [514 U.S. at

558] (quoting *Maryland v. Wirtz*, [392 U.S. 183, 197 n.27 (1968)]). The standard for the application of the FAA to an individual contract was made clear to us in [*Allied-Bruce*]. . .[T]he requirement in the FAA that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals "an intent to exercise Congress' commerce power to the full." [*Allied-Bruce*, 513 U.S. at 277]. The Court also stated that to be subject to the FAA a contract did not have to evidence a transaction that was "'substantially' interstate." [*Allied-Bruce*, 513 U.S. at 269]. Thus, I believe this Court erred when it held in *Sisters of the Visitation* that a particular contract, in order to be enforceable under the FAA must, by itself, have a substantial effect on interstate commerce . . ."

McConnell at *11.

In the present case, the Alabama Supreme Court denied arbitration by imposing a substantiality requirement neither intended by the FAA nor enunciated by this Court. The court now requires that a discrete transaction, such as the loan restructurings in the present case, must individually substantially affect interstate commerce. Such a ruling necessarily overwrites established FAA jurisprudence by modifying *Allied-Bruce* and overwriting *Wickard*. The lower court has taken *Lopez*, a case that did not involve commerce or economic activity whatsoever, and has superimposed its "substantiality" language upon every FAA analysis via the *Sisters of the Visitation* five-part test. As a result, the court has advanced its "strong public policy"

against arbitration, a position directly opposed to the purpose of the FAA.

II. THE DECISION BELOW CONFLICTS WITH THE VIEW OF OTHER STATE AND FEDERAL COURTS ON THE SCOPE OF "INVOLVING COMMERCE" UNDER SECTION 2.

Because Alabama now utilizes a test for interstate commerce that focuses solely upon a discrete transaction, and requires a substantial nexus between that transaction and interstate commerce, the state has departed from the correct approach followed by other state and federal courts interpreting Section 2 of the FAA. Those courts have determined that in the context of *commercial* activity, *Lopez* did not restrict the principles of *Allied-Bruce*. For example, the Supreme Court of Texas has specifically ruled that *Lopez* did not modify the "involving" or "affecting" test for interstate commerce, noting that this Court did not suggest in any way that it had changed its view of Congress' commerce power over economic activities. *In re L&L Kempwood Associates, LP*, 9 S.W.3d 125, 127 (Tex. 1999), see also *In re Education Management Corp., Inc.*, 14 S.W. 3d 418, 424 (Tex.App.-Houston 2000) (FAA does not require a substantial effect on interstate commerce; rather, it requires only that commerce be involved or affected); but see *In re Turner Bros. Trucking Co.,Inc.*, 8 S.W.3d 370, 375-76 (Tex.App.-Texarkana 1999) (concluding that, after *Lopez*, burden is to prove a substantial effect on interstate commerce). The Ninth Circuit distinguishes between economic and non-economic activity. For example, in *United States v. Woodruff*, 941 F.Supp. 910, 923 (N.D.Cal. 1996), the federal district court had ruled in a criminal case that *Lopez* eliminated the *de minimis* approach to interstate commerce jurisdictional inquiries. The Ninth Circuit reversed, *United States v. Woodruff*, 122 F.3d 1185 (9th Cir.

1997), holding that a Hobbs Act conviction was properly analyzed under the *de minimis* effects test because, unlike the statute at issue in *Lopez*, the Hobbs Act was directly aimed at *commercial* activity.

Other courts correctly distinguish between the "substantial effects" upon interstate commerce necessary for Congress to regulate purely *intra*state activity, as opposed to the "involving" or "affecting" test to satisfy an *inter*state jurisdictional prerequisite. See, e.g., *U.S. v. Nachef*, 1998 WL 151270 *5 (D.Mass.) ("*Lopez* itself makes clear that the 'substantiality' holding applies only to the regulation of purely *intrastate* economic activity, and that where a statute contains an express jurisdictional element, as is true of the Hobbs Act, the regulated activity is, *by definition, interstate.*"), citing *United States v. Harrington*, 108 F.3d 1460, 1465-66 (D.C. Cir. 1997) (wherein the court cited *Allied-Bruce* for the proposition that "substantiality" does not apply to a jurisdictional element of interstate commerce); *Haeberlin Farms, Inc. v. IGF Insurance Company*, 641 N.W.2d 816, 822-23 (Iowa 2002) ("The Supreme Court has made it clear that, when a statute regulates purely economic matters, as in *Wickard,* it is not subject to the constitutional infirmities of the statutes in *Lopez* and *Morrison.*") By including an interstate jurisdictional prerequisite in the FAA, Congress is by definition regulating only interstate economic activity, which means the relationship to interstate commerce of the subject transaction need not be "substantial."

These rulings are consistent with caselaw from jurisdictions construing the FAA and its reach broadly. As a rule, most courts look not only to the transaction itself, but also beyond the transaction to the circumstances and the parties to determine whether interstate commerce is in any way "involved." E.g., *Government of Virgin Islands v. United Indus. Workers, N.A.*, 169 F.3d 172, 176-77 (3rd Cir.

1999) (noting the "scant" evidence of interstate commerce, but holding interstate commerce was satisfied because one of the parties, UIWNA, "is an international body embracing Union workers not only in the various states of the union, but in foreign countries as well" and because "its activities, by their very nature, qualify as having an interstate nexus."). (Contrast the instant case, wherein the Alabama Supreme Court refused to consider the parties and the nature of their respective businesses, instead focusing solely upon the restructured promissory notes in a vacuum).[11] See also *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 117-18 (S.C. 2001) (noting the expansive view of the FAA and holding that, although the development of land is a purely intrastate activity, the transaction "involved" interstate commerce because the partnership utilized out-of-state materials, contractors, and investors), citing *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647 (S.C. 1977) (holding that a construction contract involved interstate contract where materials, equipment, and supplies were produced and manufactured out-of- state); see also *McIntosh v. Tenet Health Systems Hospitals, Inc.*, 48 S.W. 3d 85, 88 (Mo.App. 2001) (holding that employee's "tangential" affect upon employer's business activities satisfied the FAA, where the employer treated out-of-state patients, received goods and services from out-of-state vendors, and received reimbursement from out-of-state entities.).

Alabama, on the other hand, has sharply deviated from this Court and lower courts in adopting its *Sisters of the*

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[11] This was the view urged by Alafabco's counsel in the trial court proceedings. He stated: "The fact that [Citizens Bank does] business with anybody in the world, has no affect on this particular client who is locally owned. . .The fact that they bring deposits in from all over the world and the fact that they deal with companies all over the world, as far as the bank goes, it doesn't have any bearing on whether this particular transaction substantially affects interstate commerce. (Vol. II, Tr. 57-58).

Visitation "substantial effect" test. In the present case, Citizens Bank presented evidence that it held a security interest for the subject loans in Alafabco's accounts receivable (including out-of-state receivables) and in its equipment and inventory (including those manufactured in part in other states). The bank's commercial loan business in the aggregate is substantial, involving millions of dollars extended to commercial businesses. Further, Citizens Bank itself is governed by federal regulations and laws, as its business certainly affects interstate commerce. Despite this and other evidence, the Alabama Supreme Court applied *Sisters of the Visitation*, a case giving only narrow effect to Section 2 of the FAA, and found no "substantial" nexus between the individual debt restructuring transactions and interstate commerce. This ruling and the court's analysis are contrary to the language of the FAA, the purpose of the FAA, this Court's rulings on the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Supreme Court of Alabama

Special Term, 2002

1010703

Alafabco, Inc.

v.

The Citizens Bank et al.

Appeal from Lawrence Circuit Court
(CV-00-261)

WOODALL, Justice.

Alafabco, Inc., appeals from the trial court's order granting the motion of The Citizens Bank and its employees to compel arbitration of this dispute. We reverse and remand.

I. Factual Background

The relationship between the parties and the genesis of this dispute were briefly summarized in a complaint filed on November 15, 2000, by Alafabco, Inc., and three of its officers or employees, namely, Donnie Cottingham, Joann Beck, and Weston Beck, against the Bank and a number of its employees, including Doug Alexander, Roger Campbell, and Wayne Gentry (hereinafter referred to collectively as "the Bank"). In pertinent part, the complaint alleged:

"6. In 1986, the plaintiffs and defendants entered into a quasi-contractual relationship wherein the plaintiffs secured construction contracts and the defendants provided the necessary operating capital to complete the project. Upon completion of a project, the plaintiffs repaid the funds, together with accrued interest to the defendants.[1]

"7. The plaintiffs continued to operate under the implied agreement until 1998, at which time the defendants encouraged plaintiffs to bid on a large project [for Champion International (the full and correct name of this company is not clear from the record) at its facilities in Courtland, Alabama,] and then, when plaintiffs bid was accepted and plaintiffs began work, the defendants refused to provide the necessary operating capital for the completion of the contract. As a result of the defendants' breach of the agreement, the plaintiffs began to incur massive debt."

According to Alafabco, it attempted to compensate for the alleged breach by "using the monies provided by The Bank in the prior funding." Appellant's Brief, at 4. Nevertheless, it "became delinquent in repaying its existing obligations to [the] Bank." Appellant's Brief, at 4. Subsequently, the parties negotiated an agreement, pursuant to which "all of the loans with the Plaintiffs were restructured and redocumented through various notes dated May 3, 1999."

[1] The bank loans were secured by invoice numbers of the jobs to be performed by Alafabco. Appellant's Brief, at 3.

Appellees' Brief, at ix. Along with the "renewal notes" executed as a result of these negotiations, the parties signed a document containing the following pertinent provisions:

> "AGREEMENT TO ARBITRATE. The Citizen Bank ('Lender') and the undersigned agree that all disputes, claims, or controversies ('Disputes') between them, whether individual, joint, or class in nature, including contract and tort disputes and any other matter at law or equity, shall be resolved by arbitration upon request of either party at any time, notwithstanding the prior filing by either party of any legal action, except as otherwise indicated in this Agreement or agreed to in writing by the parties. In an arbitration, an arbitrator, who is an independent, neutral party, gives a decision after hearing the positions of the parties. It is understood and agreed that arbitration pursuant to this agreement shall be binding upon both parties and that both parties are waiving their respective rights to a jury trial. However, nothing in the loan documents or this agreement shall preclude any party from seeking equitable relief from a court of competent jurisdiction.
>
> "GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the

> American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern."

Subsequently, Alafabco defaulted on its payments under the "renewal notes," and, it alleges, the Bank published notices of foreclosure on its property. Consequently, Alafabco sought bankruptcy protection in the United States Bankruptcy Court for the Northern District of Alabama. That action was settled and Alafabco's petition in bankruptcy was dismissed.

However, that settlement involved a second debt restructuring, evidenced by a second set of renewal notes executed December 10, 1999. At that time, the amount allegedly due the Bank was approximately $430,000. The debt restructuring involved a note of the individual plaintiffs, secured by a mortgage on commercial real estate owned by Cottingham and the Becks; a note of Alafabco, secured by accounts receivable, inventory and supplies, fixtures, machinery and equipment, and motor vehicles; and a mortgage on Cottingham's house. That same day, the parties also executed an arbitration agreement containing provisions functionally identical to the arbitration agreement signed on May 3, 1999 (the May 3, 1999, arbitration agreement and the December 10, 1999, arbitration agreement are hereinafter referred to collectively as "the Arbitration Agreements").

The plaintiffs' 18-count complaint, filed nearly a year after the execution of the second set of renewal notes, sought compensatory and punitive damages under multiple theories, including breach of contract, fraud, breach of fiduciary duties, defamation, conspiracy, intentional infliction of

emotional distress, and interference with a contractual or business relationship. The Bank moved to compel arbitration of the dispute, based on the Arbitration Agreements. The trial court granted the motion, and Alafabco appealed.

II. Discussion

On appeal, Alafabco contends that the Arbitration Agreements are unenforceable because, it argues, the transaction at issue does not have a nexus with interstate commerce sufficient to invoke the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"). The Bank's first response is that the agreements are enforceable whether or not the transaction has a connection with interstate commerce. This is so, because, it argues, this case involves postdispute agreements, which, it contends, are not contrary to state law. More specifically, it states: "[T]he Plaintiffs entered into the Arbitration Agreements after they had already defaulted on their various obligations to the Bank. ... As a material consideration to the restructuring of [their] obligations, the plaintiffs agreed to submit any dispute heretofore or thereafter arising ... to binding arbitration." Appellees' Brief, at 2 (emphasis added). "Therefore," the Bank continues, "the Arbitration Agreements . . . were executed after a dispute had already arisen and were not subject to the[interstate-commerce] restriction" as would be the case had they been executed before the dispute. Appellees' Brief, at 4. We disagree with the Bank -- not with its characterization of the chronology of events,[2] but with its conclusions.

[2] In fact, we need not -- and do not -- decide whether the Arbitration Agreements are predispute or postdispute agreements.

Unlike predispute arbitration agreements, which contravene Ala. Code 1975, § 8-1-41(3), postdispute arbitration agreements are enforceable in Alabama, either under the Alabama Arbitration Act, Ala. Code 1975, §§ 6-6-1 to -16 ("the AAA"), or at common law. Ala. Code 1975, § 6-6-16; Fuerst v. Eichberger, 224 Ala. 31, 33, 138 So. 409, 410 (1931); Rodney Max, "Arbitration -- the Alternative to Timely, Costly Litigation," 42 Ala. Lawyer 309, 317-18 (1981). However, there is no evidence in this case of an agreement to proceed under the AAA or the common law. On the contrary, the Arbitration Agreements provided: "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this Agreement." (Emphasis added.)

Moreover, the Bank did not propose in the trial court to arbitrate outside the framework of the FAA. On the contrary, it based its "Motion to Stay Action and Compel Arbitration" on the FAA, stating: "An Agreement which contains specific provisions requiring parties to Arbitrate disputes involving or [a]ffecting interstate commerce is specifically enforceable under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq.; Allied-Bruce Terminix Companies v. Dobson, 115 S. Ct. 834 (1995)." It then cited various examples of how, in its view, "the dealings of the parties ... substantially contemplated and impacted upon interstate commerce."

It repeated those contentions in its "Brief in Support [of the Motion] to Compel Arbitration." There, it also argued that this case is distinguishable from Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000), in

which this Court determined, applying a five-part test, that the transaction at issue there did not substantially affect interstate commerce, and, therefore, that an arbitration agreement was not enforceable under the FAA. In this case, neither the motion nor the supporting brief refers to the AAA or to arbitration under the rules of common law. Clearly, the parties did not contemplate arbitration under the authority of the AAA or the common law of Alabama. Consequently, arbitration of this dispute must proceed, if at all, under the FAA.

The FAA preempts Alabama law disfavoring predispute arbitration agreements only if the dispute is subject to a written arbitration agreement "relating to a transaction substantially affecting interstate commerce." Ex parte Greenstreet, Inc., 806 So. 2d 1203, 1209 (Ala. 2001); see also F.A. Dobbs & Sons, Inc. v. Northcutt, [Ms. 1991155, November 2, 2001] __ So. 2d __ (Ala. 2001). The proponent of arbitration bears the burden of proving a sufficient connection with interstate commerce, Brookfield Constr. Co. v. Van Wezel. [Ms. 1010353, June 28, 2002] __ So. 2d __, __ (Ala. 2002); TranSouth Fin. Corp. v Bell, 739 So. 2d 1110 (Ala. 1999), applying the five-part test set forth in Sisters of the Visitation.

In an attempt to carry this burden, the Bank presented the affidavit of Roger Campbell, its "president and chief executive officer." He recited the following factors as bearing on the interstate-commerce question:

> "The Citizens Bank is a lending institution which routinely conducts business in interstate commerce, such as the business

conducted between it and the Plaintiffs, at issue in this litigation. The business records attached as Exhibit A and Exhibit B clearly demonstrate that a substantial portion of the money loaned by [the Bank] to Alafabco was used to finance labor and materials used by Alafabco to perform work at a Champion International facility in North Carolina. Additionally, the security interest held by The Citizens Bank in assets of the Plaintiffs include inventory manufactured and created using sub-products obtained outside the state of Alabama, utilizing raw materials manufactured outside the state of Alabama and sold through utilization of the U.S. mails, telephones and other methods of communication through interstate commerce. The security interest of The Citizens Bank and accounts receivable of the plaintiff Alafabco, Inc., are distributed through the U.S. mails, payments are obtained through the U.S. mails and proceeds are deposited in bank accounts subject to Federal Regulations and clearance through interstate settlement procedures and policies. The debt restructuring at issue in this matter was carried out in the course of a proceeding in the United States Bankruptcy Court, a court which has a profound impact upon interstate commerce, in my judgment. Moreover, payments by and between the parties in connection with their dealing were made by check which were cleared by the Federal Reserve, using the U.S. mails and interstate financial settlement procedures and

institutions. In the course of dealings between the parties. The Citizens Bank mailed notices of foreclosure and other correspondence related to the dealing between the parties through the United States Postal Service. Further, the policies and procedures governing the actions of The Citizens Bank, its officers, employees and governing the transactions between the parties to this litigation were subject to regulation by Federal Agencies and Federal Laws. Further, the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records."

These recitations fall into six general categories, namely, (1) the nature of the Bank's business; (2) the nature of Alafabco's business; (3) the general "course of dealings between the parties"; (4) the use of various communication media in dealings between the parties; (5) the existence of federal regulations; and (6) the nature of the specific transaction at issue. We shall address these categories in the context of Sisters of the Visitation.

Recently, we stated:

> "The test adopted in Sisters of the Visitation focuses on the quantity and quality of involvement of foreign entities with the

> subject transaction. Specifically, the subjects of inquiry are (1) the 'citizenship of the parties,' (2) the origin of any 'tools and equipment' actually used in the transaction, (3) the 'allocation of cost of services and materials,' (4) the 'subsequent movement across state lines' of the 'object of the services, ' and (5) the 'degree of separability from other contracts.' 775 So. 2d at 765-67. An analysis applying these factors is 'necessarily fact intensive.' Id. at 765 n.5."

Brookfield Constr. Co. v. Van Wezel, [Ms. 1010353, June 28, 2002] __ So. 2d __, __ (Ala. 2002).

A. Categories One, Two, and Three

The Bank argues that the overall nature of its business operations, those of Alafabco, and the "course of dealings of the parties" supports arbitrability. We disagree with this argument. Indeed, these factors are largely irrelevant to an FAA interstate-commerce analysis.

The FAA renders enforceable any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal ...." 9 U.S.C. § 2 (emphasis added). Thus, on its face, the FAA applies only to "transactions," "contracts," and "controversies."

The FAA defines "transactions" in the maritime context, as including "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters ... which, if the subject of controversy, would be embraced within admiralty jurisdiction." '9 U.S.C. § 1 (emphasis added). The FAA focuses on the narrow concepts of acts, omissions, or agreements, not on the broader concepts on which the Bank focuses, such as the nature of the parties' businesses or the general "course of dealings between the parties." Thus, the facts that the Bank "routinely conducts business in interstate commerce"; that Alafabco owns and uses materials "manufactured outside the state of Alabama"; and that Alafabco operates its business with funds borrowed from the Bank cannot support arbitrability of this dispute.

Moreover, under §§ 1 and 2, the FAA applies only where the transaction affecting interstate commerce is the "subject of [the] controversy." The relevant transactions in this case are the debt restructurings of May 1999 and December 1999, evidenced by the renewal notes and the attendant Arbitration Agreements. Indeed, the Bank characterizes the dispute as "whether Alafabco was in default on the contract [s] between it and the Bank." Appellees' Brief, at 4. Thus, testimony regarding loans to Alafabco cannot support arbitrability, absent a showing that -- at a minimum -- they were part of the restructured debt, that is, that they were somehow involved in this dispute. For these reasons, the recitations related to categories one, two, and three do not establish that the transaction had a substantial effect on interstate commerce.

B. Categories Four and Five

The Bank argues that involvement of the various forms of communication recited in Campbell's affidavit, such as the United States Postal Service "and other methods of communication," as well as the existence of federal regulations governing loan transactions and deposits in general, can support arbitrability. We disagree with this argument also.

Much of the rationale in the preceding section weighs with equal force against this argument. Additionally, the substantial-effect test of Sisters of the Visitation logically contemplates the converse, namely, the de minimis effect. Thus, in Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] __ So. 2d __ (Ala. 2002), a plurality of this Court recently concluded that a $1,000 earnest-money deposit on the purchase of a condominium unit paid to Regions Bank, allegedly a foreign corporation, "was de minimis as compared to the entire purchase price [of $106,000 plus miscellaneous charges and fees]." ___ So. 2d at __. Consequently, the transaction did not satisfy the Sisters of the Visitation substantial-effect "test. This was true, even when considered in the aggregate with "combined payments to State Farm, also a foreign corporation, ... of $217 and $214 for contents insurance and flood insurance," and a $495 payment for a "home warranty through American Home Shield," also a foreign entity. Morris, __ So. 2d at __. The combined payments "represent[ed] less than one percent of the purchase price." Id. See also Ex parte Learakos, [Ms. 1000244, July 13, 2001] __ So. 2d __ (Ala. 2001) ("the ostensible transfer of the funds for the plaintiff's $1,000 earnest money payment from the drawee bank in Illinois to

the Alabama payee of the check drawn in Alabama [did] not establish a substantial effect of [a] real estate sale and purchase on interstate commerce").

The interstate communications services and sundry federal regulations on which the Bank seeks to rely touch this transaction so remotely and tangentially as to warrant no consideration. Holding that a transaction is subject to the FAA simply by virtue of the ordinary use of interstate communication media in its furtherance, or by Congressional regulation of some aspect of one party's business, would effectively transform every "local" transaction into a "national" one. As Sisters of the Visitation points out, such an approach is impermissible under our federal system of government. 775 So. 2d at 767 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

C. Category Six

Finally, we address the Bank's contentions regarding the transaction at issue, specifically, Campbell's affidavit testimony that "the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records." This testimony touches on a valid consideration, and, if supported by the record, could afford a basis for arbitrability. This is so, because it suggests that part of the money specifically involved in the debt restructuring was used to finance operations in North Carolina and Tennessee.

In that connection, the record contains four invoices, three of which evidence interstate transactions. In particular, Alafabco invoice 676 in the amount of $39,574.36, dated August 21, 1995, is addressed to "Champion International, Main Street, Canton, NC." The subject of invoice 676 is "Doctor Blade Maintenance, Canton Mill," and the invoice includes an itemization of charges for materials, labor, lodging, and travel. Alafabco invoice 681 for $9,209, dated August 18, 1995, bears the same address. The subject of invoice 681 is the installation of a fan, and the prices are itemized as in invoice 676. Alafabco invoice 685 for $11,500 is addressed to Champion International, at its Courtland, Alabama, facility. Alafabco invoice 796, dated December 20, 1995, is addressed to "SCA Services, 6919 Flagstone Drive, Ooltewah, TN, " and is in the amount of $4,000. The subject of invoice 796 is "Agusta Newsprint Doctor Blade maintenance."

The record further contains an instrument dated August 23, 1995, evidencing the loan of $31,659.49 from the Bank to Alafabco, namely, "Loan Number 3068814." The instrument specifically references invoice 676. The maturity date of that loan was November 21, 1995, at which time a "single payment of all principal and interest [was] due." The record contains a similar instrument dated August 31, 1995, evidencing the loan of $21,130.01, namely, "Loan Number 3068897." Loan Number 3068897 specifically referenced invoice 681 and invoice 685, and exhibited a maturity date of November 29, 1995. On that date, a "single payment of all principal and interest [was] due." These loans apparently financed the transactions evidenced by invoices 676, 681, and 685.

However, those projects all occurred in 1995, three years before the occurrence of any of the events made the basis of Alafabco's complaint or of the alleged defaults that precipitated the debt restructuring. There is no evidence indicating that Alafabco defaulted on either of those loans. Thus, for all that appears, those transactions had nothing to do with this controversy. In other words, the Bank made no showing as to what portion --if any --of Loan Number 3068814 or Loan Number 3068897 remained unpaid at the time of the debt restructuring. It made no showing as to what portion – if any --of the restructured debt was attributable to the 1995 loans. Having thus failed to show the quantity and quality of involvement of the North Carolina and Tennessee projects with the subject transaction, it showed -- at most -- a mere "proximity of [the subject transaction] to contracts substantially affecting interstate commerce." Sisters of the Visitation, 775 So. 2d at 767. On the state of the record, in other words, the 1995 projects are wholly "separable" from the subject transaction. Id.

Moreover, under Sisters of the Visitation and its progeny, "the simple fact that loan proceeds are 'mobile' does not require the conclusion that all loan transactions are inherently interstate in nature." Alternative Fin. Solutions, LLC, v. Colburn, [Ms. 1001285, November 16, 2001] __ So. 2d __, __ (Ala. 2001). Compare American Gen. Fin., Inc. v. Branch, 793 So. 2d 738, 747 (Ala. 2000), cert. denied, __ U.S. __, 122 S. Ct. 342 (2001), in which evidence was presented that indicated that the relevant loan proceeds actually moved in interstate commerce, as did the payments. The Bank, however, made no showing that proceeds, or payments, moved in interstate commerce, that is, it made no

showing of arbitrability under the fourth Sisters of the Visitation factor ("subsequent movement across state lines").

III. Conclusion

In short, it is undisputed that the parties in this case are Alabama residents. The Bank did not show that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects. Consequently, the Bank failed to carry its burden of proof on the interstate-commerce issue.

For this reason, the trial court erred in granting the Bank's motion to compel Alafabco to arbitrate its dispute with the Bank. That order is, therefore, reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Houston, Lyons, Brown, Johnstone, Harwood, and Stuart, JJ., concur.

Moore, C.J., concurs in the result.

See, J., dissents.

SEE, Justice (dissenting).

I believe that the majority erroneously reverses the trial court's order compelling arbitration; therefore, I respectfully dissent.

I.

First, the arbitration agreement is not made invalid under Alabama law simply because it provides that "[t]he Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement." In 1986, Alafabco, Inc., and The Citizens Bank entered into a quasi-contractual relationship in which the Bank agreed to loan Alafabco funds to complete certain construction projects. In 1998, Alafabco defaulted on its obligations to the Bank. Thereafter, the parties negotiated an agreement that provided for the restructuring and redocumenting of Alafabco's existing debt to the Bank. As part of the debt-restructuring negotiations, Alafabco and the Bank executed "renewal notes" dated May 3, 1999, and signed an "Agreement to Arbitrate." The arbitration agreement included the following provision:

> "GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern."

After the restructuring, Alafabco again defaulted on

its loan, and the Bank began collection efforts. In September 1999, Alafabco filed a petition in bankruptcy pursuant to Chapter 11. The Bank moved for adequate protection of the property Alafabco had pledged to secure its obligations to the Bank. Alafabco and the Bank, both represented by counsel, negotiated a second debt-restructuring agreement, a second set of renewal notes dated December 10, 1999, and another arbitration agreement containing the same provisions as the May 3, 1999, arbitration agreement.

Alafabco sued the Bank on November 15, 2000, and the Bank moved to compel arbitration. Roger Campbell, president and chief executive officer of the Bank, and Doug Alexander, a vice president, submitted affidavits in support of the motion to compel arbitration. Campbell and Alexander both state in their affidavits that Alafabco was "provided with a completely free choice with regard to whether to simply allow The Bank to move forward with the legal rights it already possessed, or instead, to enter into the debt restructuring agreement at issue." They further state that, "[a]s a part of the debt restructuring agreement, alternative dispute resolution agreements were executed."

Alabama cases and statutes distinguish between predispute arbitration agreements, i.e., agreements executed before a dispute between the parties has arisen, and postdispute arbitration agreements, i.e., agreements to arbitrate executed after a dispute has arisen. While, under Alabama law, predispute arbitration agreements are unenforceable, agreements to arbitrate disputes that have already arisen are enforceable under the Alabama Arbitration Act (the "AAA") and at common law. Ala. Code 1975, § 6-

6-1 and § 6-6-16; Fuerst v. Eichberger, 224 Ala. 31, 33, 138 So. 2d 409, 410 (1931). Parties that enter into such postdispute arbitration agreements are aware of the nature of the complaint they are allowing to proceed to arbitration. Ex parte Alien, 798 So. 2d 668, 676 (Ala. 2001) (Moore, C.J., concurring in the result).

Alafabco and the Bank entered into their arbitration agreement after their dispute had arisen. Alafabco alleges in its complaint that the Bank breached its contract with Alafabco in 1998, thus causing Alafabco to "incur massive debt." Thereafter, because Alafabco's loans were delinquent, the parties negotiated the debt-reconstruction agreement that provided for the execution of the renewal notes and the arbitration agreement. The arbitration agreement provides: "The Eederal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement."

The main opinion concludes that "there is no evidence in this case of an agreement to proceed under the AAA or the common law." I am unaware of any authority, and the majority cites none, that requires that for a contract to be enforceable under Alabama law, the parties must affirmatively assert that they choose to proceed under Alabama law. In fact, if this Court concludes that federal law does not apply in this case, then, unless the law of some other jurisdiction is implicated, the agreement is not lawless, but, instead, it is subject to the application of Alabama law. See Cherry, Bekaert. & Holland v. Brown, 582 So. 2d 502 (Ala. 1991) (stating that, while the parties normally are allowed to choose what law they wish to apply to their agreement, Alabama law will govern the agreement if the parties' choice

would run contrary to the public policy of Alabama), see also Restatement (Second) of Conflict of Laws § 187 (1977); 8 Samuel Williston, Williston On Contracts § 19:6 (Richard A. Lord, 4th ed. 1998).[3]

For the reasons I recite below, I believe that the Federal Arbitration Act governs this contract dispute, but, if, as the majority concludes, it does not, then, the agreement is governed by Alabama law. Under Ala. Code 1975, § 6-6-16, the parties entered a binding contract to arbitrate an existing dispute. They incorporated into their contract, by reference, the terms of the Federal Arbitration Act and the rules of the American Arbitration Association:

> "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association."

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[3] Williston writes:

> "The reasoning behind the Restatement rule that where the parties have chosen a law that would render the contract invalid, their choice will not be applied unless it would have applied absent their agreement is that the parties would not purposely have chosen a law that would invalidate a bargain, and that their (apparently) mistaken choice should be ignored in favor of protecting their expectation that they entered an enforceable bargain."

8 Williston, § 19:6, at 161-63 (footnote omitted).

This Court should construe those terms to give effect to the intent of the parties to enter a binding agreement;[4] thus, I believe the contract incorporates by reference the rules under which the parties intended the arbitration agreement to be interpreted. I am unaware of any authority, and the majority cites no authority, that stands for the proposition that these rules of construction, interpretation, and enforcement run contrary to the public policy of Alabama.

II.

Second, the dispute the parties agreed to arbitrate "involves commerce" and is, therefore, subject to the Federal Arbitration Act.

This Court reviews de novo a trial court's denial of a motion to stay its proceedings pending arbitration. Tefco Fin. Co. v. Green, 793 So. 2d 755 (Ala. 2001); Green Tree Fin. Corp. v. Vintson, 753 So. 2d 497, 502 (Ala. 1999). This Court has held that "'to prevail on an assertion of arbitrability, the moving party is required to produce some evidence which tends to establish its claim,'" Jim Burke Auto., Inc. v. Beavers. 674 So. 2d 1260, 1265 (Ala. 1995) (opinion on application for rehearing) (quoting In re American Freight Svs. , Inc., 164 B.R. 341, 345 (D. Kan. 1994)), and "'has the burden of proving the existence - of a contract calling for

[4] See Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000)(stating that where there is a choice between a valid construction and an invalid construction, the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms).

arbitration and proving that that contract involves a transaction affecting interstate commerce,'" Tefco Fin. Co. v. Green, 793 So. 2d at 758 (quoting Ex parte Caver, 742 So. 2d 168, 172 n.4 (Ala. 1999) (emphasis added)).

In Sisters of the Visitation v. Cochran, 775 So. 2d 759, 763 (2000), the Sisters of the Visitation had contracted with an in-state contractor to renovate a chapel located in Alabama and owned by the Sisters. Pursuant to an arbitration provision in the contract, the Sisters sought arbitration of their dispute with the contractor. In my dissent in that case, I noted that the majority held that the Federal Arbitration Act can apply to a contract only if that "individual transaction 'substantially affect[s]' interstate commerce." 775 So. 2d at 782. Since our decision in Sisters of the Visitation in March 2000, this Court has routinely denied a party the right to arbitration where that party has failed to prove that the individual transaction substantially affected interstate commerce. See Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] __ So. 2d __ (Ala. 2002) (denying arbitration in an action brought by the purchaser of a condominium unit against a real estate brokerage, a real estate agent, and the condominium association); Liberty Nat'l Life Ins. Co. v. Douglas, [Ms. 1000683, Feb. 8, 2002] __So. 2d__ (Ala. 2002) (refusing to compel arbitration where an employee of an insurance company sued her employer); Ex parte Kampis, [Ms. 1000099, Feb. 8, 2002] __ So. 2d __ (Ala. 2002) (denying arbitration in an action brought by the purchaser of a house against a contractor); Alternative Fin. Solutions. LLC v. Colburn, [Ms. 1001285, Nov. 16, 2001] __ So. 2d __ (Ala. 2001) (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); and Ex parte Learakos. [Ms. 1000244, July 13, 2001] __ So. 2d __ (Ala. 2001) (denying arbitration in an

action brought by the purchaser of a house against a real estate company and its agents).

The Supreme Court of the United States stated in United States v. Lopez, 514 U.S. 549 (1995), that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity -- not the individual transaction in isolation -- must "substantially affect" interstate commerce. Lopez, 514 U.S. 556-57. This "substantial-effect" test -- used to determine the constitutionality of a statute under the Commerce Clause -- was not a new standard created in Lopez, but has been the test of a statute's constitutionality since the early twentieth century. Id. at 555-57.

Once it has been determined that Congress acted within its Commerce Clause power in enacting a statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As Wickard v. Filburn, 317 U.S. Ill (1942), made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" Lopez, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).

The standard for the application of the Federal Arbitration Act to an individual contract was made clear to us

in Allied-Bruce Terminix Cos. v.Dobson, 513 U.S. 265, 267 (1995). The Federal Arbitration Act provides in pertinent part that "a contract evidencing a transaction involving commerce ... shall be valid ...." 9 U.S.C. § 2 (emphasis added). The Supreme Court of the United States held in Allied-Bruce Terminix that the requirement of the Federal Arbitration Act that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals an intent to "exercise Congress' commerce power to the full." 513 U.S. at 277. The Court also stated that a contract, to be subject to the Federal Arbitration Act, did not have to evidence a transaction that was "substantially interstate." 513 U.S. at 269.

Thus, I believe this Court erred when it held in Sisters of the Visitation that a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce, and this Court errs again today by applying the Sisters of the Visitation standard to this case.

Campbell states in his affidavit that "prior to May 3, 1999, [Alafabco] borrowed substantial funds from The Bank, on multiple occasions, for the purposes of covering business operation expenses, including labor and material expense for performing jobs for Champion International at that entities [sic] Kenton, North Carolina facility, as well as the Courtland, Alabama facility. These loans were not repaid at the time Alafabco began Chapter 11 bankruptcy proceedings." Campbell and Alexander both state in their affidavits that, "the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of

Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records."

Attached to Campbell's affidavit are invoices of interstate transactions. The invoices indicate that Alafabco sold equipment and materials and provided services to Champion International in Canton, North Carolina, and Ooltewah, Tennessee.

Based on the foregoing evidence presented by the Bank in support of its motion to compel arbitration, I conclude that the Bank presented the requisite "'some evidence which tends to establish [its] claim,'" Jim Burke Auto., 674 So. 2d at 1265 (quoting In re American Freight Sys., Inc., 164 B.R. 341, 345 (D. Kan. 1994)), indicating that the Bank's loans to Alafabco "involve commerce." Therefore, I would affirm the trial court's decision to compel arbitration.

IN THE SUPREME COURT OF ALABAMA

November 27, 2002

1010703

Alafabco, Inc. v. The Citizens Bank et al (Appeal from Lawrence Circuit Court: CV-00-261)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Overruled – No Opinion

WOODALL, J. – Moore, C.J., and Houston, Lyons, Brown, Johnstone, Harwood and Stuart, JJ., concur; See, J. dissents.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this the 27th day of November, 2002.

Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA

ALAFABCO, INC.
Et al,

Plaintiffs,

vs. CASE NO. CV-2001-261-J

THE CITIZENS BANK, ET AL.

ORDER ON MOTION TO COMPEL ARBITRATION BY DEFENDANTS THE CITIZEN'S BANK, DOUG ALEXANDER, ROGER CAMPBELL, AND WAYNE GENTRY

This matter comes before the Court on the Motion of the Defendants, The Citizen's Bank, Doug Alexander, Roger Campbell and Wayne Gentry, seeking to Stay the above styled action, and to compel arbitration, and the parties having appeared in open Court on the date scheduled for Hearing, and the Court having considered the Motion, briefs, evidentiary submissions, testimony and evidence offered at the hearing, in support of an in opposition to said Motion, the Court finds that the Motion is due to be and hereby is GRANTED.

From the foregoing, the Court finds as follows:

1. Based upon the evidence, the Court finds that the transactions which are the subject matter of this litigation had a substantial impact upon interstate commerce; Lopez v. Home Buyer's Warranty Corp., 670 So.2d 35 (Ala. 1995);

2. The Court finds that Plaintiffs entered into valid arbitration agreements with the Defendant, The Citizen's Bank, and that the Defendants Doug Alexander, Roger Campbell and Wayne Gentry, as "agents, employees, officers, and directors" were intended beneficiaries of the arbitration agreement. This finding specifically does not include the Defendant Charles C. Coffey, whose Motion to Compel Arbitration is the subject of a separate Order.

3. It is therefore Ordered by the Court that these proceedings are stayed as to the Defendants, The Citizen's Bank, Doug Alexander, Roger Campbell, and Wayne Gentry, and that Plaintiffs are compelled to submit their claims against said Defendants to arbitration in accordance with the Arbitration Agreements entered into between the parties.

DONE AND ORDERED this the 18th day of September, 2001.

George Craig
Special Circuit Judge